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No. 01-011324

IN THE

Supreme Court of the United States

The Metropolitan Government of Nashville and Davidson County and Emmett Turner, Chief of Police of the Metropolitan Police Department,
Petitioners,

v.

Deja Vu of Nashville, Inc., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Petition involves a challenge by respondents to the judicial review provisions of Chapter 6.54 of the Metropolitan Code of Nashville and Davidson County ("the Ordinance"), which governs the licensing of adult businesses and entertainers. The Ordinance guarantees respondents "prompt access to judicial review" by permitting them to take an immediate appeal from any adverse administrative decision and furthermore providing that the administrative decision is not effective unless and until sustained by the reviewing court "on the merits." The Ordinance does not guarantee respondents a "prompt judicial determination" in the sense that it does not require the court to hear their appeal by a date certain. The Ordinance does provide respondents with other procedural protections, however, by (a) automatically issuing an interim license or permit if the court does not decide the appeal within forty days, and (b) staying the administrative decision until the appeal is concluded.

The Questions Presented are:

1. Does Chapter 6.54 satisfy the First Amendment because it sufficiently guarantees "prompt access to judicial review," notwithstanding that it does not guarantee a "prompt judicial determination" on the merits?

2. Assuming that the answer to question one is "no," is Chapter 6.54 nonetheless constitutional because of the additional procedural protections it provides?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the following persons and entities were parties to the proceedings below and are respondents in this Court: Meroney Entertainment, Inc., d/b/a Ken's Gold Club; The Pleasure Palace, Inc.; The 822 Corporation; 421 Corporation; Carousel Amusement Center, Inc.; Michael Rucker; Michael Butler; Dawn Pierce; Elizabeth Martz; and Jerry C. Pendergrass.

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PETITION FOR A WRIT OF CERTIORARI

The Metropolitan Government of Nashville and Davidson County and Emmett Turner, Chief of Police of the Metropolitan Police Department (collectively, "petitioner") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.[1]

OPINIONS BELOW

The Sixth Circuit's opinion (per Martin, C.J., with Suhrheinrich, J.; Wellford, J., concurring in part and dissenting in part) (Pet. App. 1a-41a) is published at 274 F.3d 377. The Sixth Circuit's order denying rehearing and rehearing *en banc* (Pet. App. 42a) is unpublished. The district court's opinions and orders (*id.* 43a-128a) are unpublished.

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The appendix (at 129a-176a) reproduces the First Amendment to the United States Constitution, Tenn. Code Ann. § 27-9-111, and the version of Chapter 6.54 of the Metropolitan Code of Nashville and Davidson County applicable to this case.

JURISDICTION

The Sixth Circuit denied petitioner's timely petition for rehearing with a suggestion of rehearing *en banc* on February 5, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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[1] Because Chief Turner is a party only in his capacity as an official of the Metropolitan Government, this Petition uses the collective "petitioner."

STATEMENT

It's like *déjà vu* all over again.

This Court has twice recently granted certiorari to resolve the substantial circuit conflict over the principal question presented by this Petition: whether, under *FW/PBS, Inc.* v. *Dallas*, 493 U.S. 215 (1990), and *Freedman* v. *Maryland*, 380 U.S. 51 (1965), the First Amendment mandates that adult businesses receive a "prompt judicial determination" on appeal from the denial of a license to operate or whether it instead requires only that businesses receive "prompt access" to judicial review. But, in both cases, the Court ultimately did not reach the question. See *Thomas* v. *Chicago Park Dist.*, 122 S. Ct. 775, 781 (2002) ("Because the Park District's ordinance is not subject to *Freedman*'s procedural requirements, we do not reach one of the questions on which we granted certiorari, and on which the Courts of Appeals are divided: whether the requirement of prompt judicial review means a prompt judicial determination or the prompt commencement of judicial proceedings." (citing, *inter ālia*, *Nightclubs, Inc.* v. *Paducah*, 202 F.3d 884 (CA6 2000)); *City News & Novelty* v. *Waukesha*, 531 U.S. 278, 281 (2001) ("Courts have divided over the meaning of *FW/PBS*'s 'prompt judicial review' requirement. * * * We granted certiorari to resolve the conflict. 530 U.S. 1249 (2000). We now find, however, that the issue stemming from *Freedman* is not genuinely presented to us in this case." (citations omitted)).

This Petition presents the Court with an ideal vehicle to finally decide the issue. The provisions of the Metropolitan Code of Nashville and Davidson County governing the licensing of adult businesses specify that any adverse administrative decision "may be immediately appealed." The Code does *not*, however, guarantee that the appeal will be decided by a date certain. Applying its earlier decision in *Nightclubs, Inc.*, *supra*, the Sixth Circuit held that the Ordinance is invalid because "the Ordinance's judicial review

provisions do not guarantee prompt judicial review, as required by the First Amendment." Pet. App. 33a.

Because at least four circuits would reach the opposite result on this important and frequently recurring question of constitutional law (see *Thomas*, *supra*, 122 S. Ct. at 781 (citing decisions of the First, Fifth, Seventh, and Eleventh Circuits holding that the First Amendment does not require a "prompt judicial determination" on appeals from adult-business licensing decisions)), certiorari should be granted.

* * * *

This is, hopefully, the final chapter in respondents' long-running and largely unsuccessful effort to invalidate petitioner's regulation of adult businesses. The Sixth Circuit rejected numerous challenges to Chapter 6.54 of the Metropolitan Code of Nashville and Davidson County ("the Ordinance"), which governs adult-business licensing, but (by a divided vote) ultimately invalidated the Ordinance *in toto* because it failed to guarantee "prompt judicial review" of an adverse administrative licensing decision.

1. The Ordinance requires that adult businesses hold licenses to operate. See Ord. § .030(A).[2] Initial decisions regarding the issuance, renewal, and revocation of licenses are made at the administrative level by the Metropolitan Government based on criteria unrelated to the content of any speech. See *id.* §§ .040(C)(2), .110(K), .150(A)(1)-(10). The Ordinance requires the government to rule on applications for new licenses and applications to renew licenses within forty-seven days. See generally Pet. App. 99a-100a (district court's explanation of timing at municipal level).[3]

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[2] Citations to "Ord. § .xxx" are to subsections of Chapter 6.54.

[3] The Ordinance similarly requires that adult-entertainment dancers (denominated as "entertainers" by the Ordinance) hold "permits." See Ord. § .060(A). Because the Ordinance treats appeals by entertainers identically to appeals by adult businesses (compare Ord. § .070(D)(2) with *id.* § .040(E)(2)), this Petition's references to "adult businesses" also

This Petition concerns the Ordinance's provisions for judicial review of adverse administrative rulings. An adult business may "immediately appeal[]" any adverse administrative decision by seeking a common law writ of certiorari from a state trial court. See Ord. §§ .040(E)(2) (new business licenses), .070(D)(2) (new entertainer permits), .110(M) (renewal of licenses and permits), .150(E)(6) (revocation of licenses and permits).[4]

A metropolitan government such as petitioner has no power to require a state court to grant a writ of certiorari or to act on an appeal by any particular date. To obviate any potential First Amendment concerns arising from the prospect that a trial court might decline to hear appeals by existing businesses such as respondents that have been ordered to cease operations, the Ordinance provides that the administrative ruling is void unless considered by the court on appeal and sustained. The Ordinance thus provides that, if respondents appeal, the adverse administrative decision "shall not take effect until that decision has been upheld by the court after adjudication *on the merits*." See Ord. §§ .040(E)(3) (emphasis added), .070(D)(3). If the trial court delays its decision on the merits more than forty days from the filing of the appeal, an interim license is automatically granted. See *id.* If the trial court grants the writ, and thus determines to consider the appeal, state law requires that "the court shall hear the matter and issue its decision within forty (40) days" thereafter. Tenn. Code Ann. § 27-9-111.

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encompass "entertainers," while references to "licenses" also encompass "permits."

[4] Although an adult business uniformly may "immediately appeal[]," the Ordinance's judicial review provisions vary in other respects, at least in form, depending on whether the adult business is already operating at the time of the administrative ruling. Compare, *e.g.*, Ord. § .040(E)(3) with *id.* § .040(E)(4). Because each of the respondents is, in fact, already operating, the text discusses the provisions applicable to them.

2. Respondents are existing adult businesses and adult-entertainment dancers. Upon the initial enactment of the Ordinance in 1997, respondents sued petitioner pursuant to 42 U.S.C. § 1983, alleging that various provisions, including particularly those governing judicial review, violated the First Amendment. See generally Pet. App. 4a-5a (detailing the case's procedural history). The district court preliminarily enjoined the Ordinance as then enacted for failure to provide adequate judicial review. See *id.* 111a-128a.[5]

After various amendments were made to the Ordinance and to state law, the district court held the judicial review provisions to be constitutional and lifted the injunction. See Pet. App. 96a-110a. The court found that certiorari review sufficiently protects adult businesses' First Amendment interests, adopting the view of "the state courts * * * that a violation of a constitutional standard falls within the definition of 'illegal, arbitrary, or fraudulent' actions which are reviewable under common law writs." *Id.* 106a. As to the timing of judicial review, the court found it particularly important that "once the appeals process is initiated, the adverse decision is further stayed until the court upholds the decision after adjudication on the merits." *Id.* 99a. As a result, "the amended Ordinance does, in fact, provide for the maintenance of the status quo pending judicial review." *Id.* Furthermore, once the trial court grants the writ of certiorari, the case must be "heard and decided within 40 days." *Id.* 103a.[6]

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[5] In later rulings not implicated by this Petition, the district court invalidated several provisions of the Ordinance while sustaining others. See Pet. App. 45a-89a. Petitioner and respondents appealed and cross-appealed from those rulings. In a consolidated opinion, the Sixth Circuit rejected all of respondents' challenges (see *id.* 6a-25a) except as to the judicial review question presented by this Petition (*id.* 25a-34a) and an incidental definitional provision (*id.* 6a-9a).

[6] Earlier in the litigation, petitioner had asserted that the denial of a writ of certiorari constitutes a "decision on the merits" for purposes of

On respondents' appeal from the district court's ruling sustaining the amended judicial review provisions, a divided panel of the Sixth Circuit reversed. Pet. App. 25a-34a. Initially, the court of appeals held that respondents' claims were properly presented. Although respondents were not immediately threatened with the denial of a license, the court concluded that they have standing to present "a facial challenge" to the judicial review provisions applicable to them because "[a] mere threat to First Amendment interests is a legally cognizable injury." *Id.* 27a. For similar reasons, although the entertainer respondents had not yet been required to secure a license (as a result of the parties' agreement during the course of the litigation), their parallel challenges to the judicial review provisions were "ripe." *Id.* 28a.

On the merits, the Sixth Circuit majority accepted respondents' "argument that the Ordinance fails to provide the prompt judicial review required of prior restraint schemes by *Freedman* v. *Maryland*, 380 U.S. 51 (1965)," because "it fails to protect their right to expeditious judicial review on the merits." Pet. App. 25a-26a. In reaching that conclusion, the court applied its prior holding in *Nightclubs, Inc.* v. *Paducah*, 202 F.3d 884 (2000), that adult-business licensing schemes are fully subject to "at least the first two *Freedman* procedural safeguards":

> First, the decision whether or not to grant a license must be made within a specified, brief period, and the status quo must be preserved pending a final judicial determination on the merits. Second, the licensing scheme "must also assure a prompt judicial

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Tennessee law. As explained in the text, the district court disagreed, concluding that a "decision on the merits" is issued only if the trial court grants the writ and decides the appeal. Petitioner has since accepted that construction of state law (*e.g.*, Pet'r C.A. Br. 13 (administrative ruling is ineffective unless "upheld by a court"), as did the Sixth Circuit (see *infra* at 7).

> decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license."

Id. 30a (citation omitted) (quoting *Freedman*, 380 U.S. at 59).

In applying that standard to Chapter 6.54, the Sixth Circuit majority relied on the fact that (on its view of Tennessee law), a court is not obligated to grant a writ of certiorari and decide an appeal by any particular deadline, or indeed at all. Viewing the writ as "a matter of discretion" rather than "right" even in First Amendment matters, the majority could not "agree that this discretionary writ guarantees an aggrieved applicant that a court will hear and decide the merits of her claim, as required by *Freedman*." Pet. App. 31a-32a (citation omitted).

The majority immediately recognized that concerns regarding the possible unavailability of judicial review were grossly overstated, however, because if the trial court did not grant the writ of certiorari and decide the appeal "on the merits," respondents would *automatically prevail*. "The Ordinance does preserve the status quo by allowing existing businesses to continue to operate until an adjudication *on the merits* and by issuing a temporary license to new businesses if the court fails to rule within forty days of the filing of an appeal." *Id.* 33a n.8 (emphasis added). But the majority concluded that "[m]erely preserving the status quo * * * is not sufficient to satisfy *Freedman*" because, as is relevant here, "the licensing scheme 'must assure a prompt judicial decision.'" *Id.* Given that trial courts are not subject to a time limit in granting writs of certiorari, the court held the Ordinance's judicial review provisions unconstitutional and, on that basis, invalidated the Ordinance in its entirety. *Id.* 33a-34a.

Judge Wellford dissented from the majority's holding that the Ordinance was unconstitutional for failure to guarantee a "prompt judicial decision." Pet. App. 35a-41a. "If the applicant * * * does choose to appeal by seeking a writ

of certiorari, he or she is provided with a prompt record and an opportunity to challenge the procedures involved in a denial." *Id.* 40a. Moreover, "[t]here is not only such a provision but there is also a reasonable stay provision to protect a plaintiff pending judicial review":

> The majority opinion states * * * that "the ordinance does preserve the status quo by allowing existing businesses to continue to operate *until an adjudication on the merits* and by issuing a temporary license to new businesses if the court fails to rule within forty days of the filing of an appeal." (Emphasis added.) I agree with this interpretation of the effect of the ordinance, and this also presents an adequate and reasonable bulwark constitutionally, in my view.

Id. (alteration in original).

3. After the Sixth Circuit denied rehearing and rehearing *en banc* (Pet. App. 42a), this Petition followed.

REASONS FOR GRANTING THE WRIT

The grounds for granting certiorari to review the Sixth Circuit's judgment in this case are straightforward.

The circuits are split over the principal question presented by this Petition: whether, under *FW/PBS, Inc.* v. *Dallas*, 493 U.S. 215 (1990), and *Freedman* v. *Maryland*, 380 U.S. 51 (1965), the First Amendment mandates that an adult business receive a "prompt judicial determination" on appeal from the denial of a license to operate or whether it instead requires only that the business have "prompt access" to judicial review. In this case, the Sixth Circuit adhered to its ruling in *Nightclubs, Inc.* v. *Paducah*, 202 F.3d 884 (2000), that the Constitution requires a "prompt judicial determination." As this Court detailed in *Thomas* v. *Chicago Park District*, 122 S. Ct. 775, 781 (2002), the Fourth and Ninth Circuits agree with that holding, while the First, Fifth,

Seventh, and Eleventh Circuits disagree. The split is, moreover, irreconcilable without this Court's intervention, given that each side of the conflict has been joined not only by multiple circuits but by an *en banc* court. Compare *11126 Baltimore Blvd.* v. *Prince George's County*, 58 F.3d 988, 998-1001 (CA4 1995) (en banc) with *Graff* v. *Chicago*, 9 F.3d 1309, 1324-25 (CA7 1993) (en banc).

The circuit conflict is also important, as is evident from the fact that this Court granted certiorari to resolve it in both *Thomas*, *supra*, and *City News & Novelty* v. *Waukesha*, 531 U.S. 278 (2001). In the sixteen states (including Tennessee) that are subject to the "prompt judicial determination" requirement, municipalities are substantially constrained in their ability to regulate adult businesses, since they are generally powerless to require state courts to decide appeals by a fixed date. The large number of federal appellate decisions addressing the question also demonstrates that it recurs frequently.

This Petition is an ideal vehicle to resolve the conflict. Chapter 6.54 provides that any adverse licensing decision "may be immediately appealed" through the common law writ of certiorari. Neither the Ordinance nor state law, however, mandates that the reviewing court grant the writ, and thus hear the appeal, by a date certain. The Sixth Circuit majority accordingly held that "the Ordinance's judicial review provisions do not guarantee prompt judicial review, as required by the First Amendment." Pet. App. 33a.

The Sixth Circuit's characterization of the Tennessee common law writ of certiorari as "discretionary" does not detract from the square conflict presented by the Petition. The majority below construed Tennessee law to confer on trial courts the power to decline to grant a writ of certiorari, even in First Amendment cases. See Pet. App. 33a. But in an accompanying footnote, the majority immediately acknowledged that the Ordinance obviates entirely its concern

that a trial court could decline to issue a writ of certiorari. *Id.* 33a n.8. Because a municipality such as petitioner is powerless to *force* a state court to grant a writ of certiorari, the Ordinance provides that any administrative decision against existing businesses such as respondents is ineffective unless and until sustained "on the merits" by the reviewing court. Thus, if the trial court declines to grant the writ, the adult business prevails as a matter of right. *Id.*; see also *id.* 40a (Wellford, J., dissenting); *id.* 99a (district court's decision).[7] The only conceivable infirmity in that arrangement is that the adult business is not guaranteed that its appeal will be heard and decided by a particular date, which gives rise to the circuit conflict presented by this Petition.[8]

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[7] Even if this Court read the Sixth Circuit to hold separately, as a preliminary matter, that the First Amendment guarantees an adult business a right to judicial review even when the business will *automatically prevail* if judicial review is withheld, that holding would be encompassed within the first question presented. See Pet. i ("Does Chapter 6.54 satisfy the First Amendment because it sufficiently guarantees "prompt access to judicial review * * *?"). Review would be appropriate because, so far as petitioner can determine, no other court has extended the First Amendment to mandate such an abstract right of judicial review and to impose on municipalities the impossible burden of requiring state courts, over which they have no authority, to assume jurisdiction on appeal from a municipal ruling by a date certain.

[8] It also bears noting that the majority's suggestion that a state court could decline to issue a writ of certiorari in a First Amendment case is hypothetical, and there is no dispute that the writ would be denied, if ever, only in the most extraordinary circumstances. The district court, which is necessarily more familiar with state law, understood the state precedents, binding in every respect upon the state's trial courts, to mandate the issuance of writs of certiorari, albeit not on any particular deadline, when an administrative ruling prohibits speech activities. *Id.* 106a. That represents the better view. See, *e.g.*, *Hoover, Inc.* v. *Metro Bd. of Zoning Appeals*, 924 S.W.2d 900, 905 (Tenn. App. 1996) (right to writ of certiorari exists when party alleges denial of constitutional rights because such an allegation asserts that challenged action is "illegal, arbitrary or fraudulent"); see also *State* v. *Johnson*, 569 S.W.2d 808, 815 (Tenn. 1978) (right to writ of certiorari exists when denial would be "tantamount to the

Nor are there any other obstacles to certiorari. Unlike *Thomas*, *supra*, this case involves precisely the type of adult-business licensing ordinance over which the courts of appeals have divided. Unlike the adult business in *City News & Novelty*, respondents in this case remain in business and there is, accordingly, no prospect of mootness. Finally, although petitioner previously contested respondents' standing to bring this pre-enforcement challenge, as well as the ripeness of the claims of the individual entertainers, Petitioner accepts that the Sixth Circuit correctly held (see Pet. App. 27a-28a) that respondents may challenge the judicial review provisions of the Ordinance to which they are subject. See *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988) (in a First Amendment overbreadth challenge, "one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license").

Even if this Court adopts the minority view that the First Amendment guarantees adult businesses a right to a "prompt judicial determination," the second question presented by this Petition presents an ideal opportunity to define the bounds of that requirement in light of the additional procedural protections that the Ordinance provides. Although the Ordinance does not guarantee that an appeal by an adult business will be decided by a date certain, it does protect respondents' interests by automatically staying any adverse administrative ruling until the case is resolved "on the merits." In addition, the business is automatically issued an interim license in the event that the appellate process is not concluded within forty days.

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denial to either party of a day in court"). The subtext of the Sixth Circuit's contrary decision is the view, offensive to basic notions of federalism, that state court judges are less than faithful in their adherence to the law and to their respect for constitutional rights. See *Walton* v. *Arizona*, 497 U.S. 639, 653 (1990); *Espinosa* v. *Florida*, 505 U.S. 1079, 1082 (1992); *Black* v. *Romano*, 471 U.S. 606, 615 (1985).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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